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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

NATIONAL ENTERPRISES, INC., Plaintiff and Appellant, v. DENVER LAKESIDE DRIVE, LTD. et al., Defendants and Respondents.	A104290 & A106300 (San Mateo County Super. Ct. No. 411250)

National Enterprises, Inc. (plaintiff) appeals from a judgment in favor of Trevor C. Roberts (Roberts), Denver Lakeside Drive, Ltd., and Lakeside Drive, Ltd. (defendants) on its complaint seeking to collect a promissory note executed in 1986. After a court trial, the court concluded that the action was barred by the six-year statute of limitations, set forth in section 1821(d)(14) of title 12 of the United States Code (section 1821(d)(14)).

Plaintiff contends that the court erred in finding that a letter written by Roberts, on March 13, 1995, did not constitute a written acknowledgement of debt pursuant to section 2415(a) of title 28 of the United States Code (section 2415(a)) that would have restarted the limitations period. We shall find no error, and affirm the judgment.

FACTS

In February 1986, Roberts, the general partner of two limited partnerships, Denver Lakeside, Ltd., and Lakeside Drive, Ltd., executed a promissory note for $975,000, in favor of Capitol Federal Savings and Loan Association of Denver (Capitol Federal). In

1989, Roberts defaulted. Capitol Federal filed suit, but in March 1991 dismissed its complaint without prejudice.

In June 1990, the Resolution Trust Corporation (RTC), an agency of the federal government, seized the assets of Capitol Federal because it had become insolvent. In June 1994, National Enterprises, Inc. (NEI) purchased the delinquent loan from the RTC.

In December 1994, David Wick, the vice-president of NEI, wrote Roberts a letter stating that "National Enterprises is willing to settle this matter without the assistance of our attorneys. . . . [¶] . . . [¶] If you wish to resolve this matter prior to National Enterprises seeking legal remedies to cure this default, I need to hear from you. . . . If National Enterprises does not receive a response from you . . . this matter will be turned over to our Florida attorney . . . ." Roberts, in a telephone call, told Wick he wanted "to see what can we do to settle this." He agreed to, and did, provide Wick with some financial statements and tax returns.

On March 13, 1995, in response to a second letter from Wick asking for more financial information and soliciting a settlement proposal, Roberts sent a letter enclosing copies of his tax returns, which concluded with the following statement: "As a settlement offer, I offer $15,000 cash to settle the matter."

That same month, NEI filed suit against Roberts in Florida. Over the course of the next four years, it obtained two default judgments against Roberts, both of which were vacated.[1]

On December 3, 1999, NEI filed the instant complaint. After a court trial, the court entered judgment for defendants based upon the court's findings that (1) the March 13, 1995 letter Roberts wrote to NEI's vice-president did not constitute an acknowledgement of debt, but was an offer to compromise; and (2) the doctrine of equitable tolling did not apply because plaintiff's prosecution of the Florida litigation was in bad faith.[2] The court entered judgment in defendants' favor, because the complaint

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[1] NEI eventually voluntarily dismissed the Florida action on July 19, 2001.

[2] Plaintiff does not challenge the court's finding that its conduct in the prosecution of the Florida action rendered the doctrine of equitable tolling inapplicable.

was barred by the statute of limitations. NEI filed a timely notice of appeal from that judgment.

The court, in a postjudgment order, also awarded attorney fees and costs to defendants, as the prevailing party, in the amount of $140,495.61, which NEI also appealed. Pursuant to the parties' stipulation, this court ordered the two appeals consolidated for the purpose of argument and decision.[3]

ANALYSIS

It was undisputed at trial that, because plaintiff purchased the note from the RTC, a federal agency, the applicable statute of limitations was the six-year period set forth in section 1821(d)(14), which was triggered in June 1990, when the RTC took over Capitol Federal and was appointed as receiver or conservator of its assets. Unless this period was tolled, or restarted, it expired in June 1996. The instant complaint was not filed until December 3, 1999.

Plaintiff contends, as it did below, that the six-year period set forth in section 1821(d)(14) was restarted on March 13, 1995, when Roberts, in a handwritten note, enclosed certain financial information, and stated: "As a settlement offer, I offer $15,000 cash to settle the matter." It asserts that this note constituted a written acknowledgment of the debt that, pursuant to section 2415(a), restarted the limitations period.

The parties, preliminarily, dispute whether federal or state law should apply, and whether the court's determination that Roberts's note did not constitute a written acknowledgement of debt is a legal question subject to de novo review, or a mixed question of law and fact.[4] We need not resolve the dispute, however, because even if we assume arguendo that, as plaintiff contends, the federal decisions interpreting section

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[3] NEI does not dispute the amount of fees awarded. It only seeks reversal of the attorney fees order, in the event that this court reverses the judgment on appeal in case No. A104290. We shall affirm that judgment, and accordingly also shall affirm the order granting attorney fees.

[4] Defendants suggest that the issue is one of mixed law and fact, and that we should look to California cases interpreting Code of Civil Procedure section 360, which is analogous to section 2415(a).

2415(a) control, and review the court's finding de novo, we reach the same conclusion as did the trial court; i.e., that the March 13, 1995 letter did not constitute an acknowledgement of the debt that restarted the limitation period set forth in section 1821(d)(14).

Section 2415(a) is a statute of limitations generally applicable to contract actions brought by the United States. It includes a provision specifying that, "in the event of later partial payment or written acknowledgement of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgement." This provision has been held to apply to actions, such as this one, that are also governed by the more specific six-year statute of limitations established by section 1821(d). (See, e.g., *SMS Financial, Ltd. v. ABCO Homes, Inc*. (5th Cir. 1999) 167 F.3d 235, 242; *Midstates Resources v. Farmers Aerial Spraying Ser*. (N.D. Tex. 1996) 914 F.Supp. 1424, 1426 (*Midstates Resources*).)

"The legislative history of § 2415 reflects a congressional intent to codify the common law principle that '[t]he obligation of a debt will continue where a debtor has acknowledged the debt and indicated his willingness to discharge the obligation.' *See* S.Rep. No. 1328, 89th Cong., 2d Sess. 3 (1966), *reprinted in* 1966 U.S. Code Cong. & Admin. News 2502, 2504. [Citations.] This principle rests in turn upon the premise that when a debtor has unequivocally acknowledged a preexisting debt and demonstrated an intention to honor it, [he or] she has effectively made a new promise to pay the debt and thereby triggered a new limitations period." (*U.S. v. Lorince* (N.D. Ill. 1991) 773 F.Supp. 1082, 1087 (*Lorince*).) "[T]o extend the enforcement time beyond the statutory period, the acknowledgment in the writing *must be unequivocal* and *must express an intention on the part of the debtor to pay.*" (*United States v. Glens Falls Ins. Co.* (N.D.N.Y. 1982) 546 F.Supp. 643, 645, italics added; see also *U. S. v. Blusal Meats, Inc.* (2d Cir. 1987) 817 F.2d 1007, 1010 (*Blusal*).) If the debtor unequivocally acknowledges that a sum of money is owed, then, in the absence of a denial of willingness to pay, the promise or intention to pay may be implied. (*Blusal*, *supra*, at p. 1010.) An assertion of *inability* to pay is not the same as a denial of willingness to pay, and does not preclude implication of

a promise to pay when the debtor unequivocally acknowledges the existence of an obligation or indebtedness. (*Ibid*.)

Plaintiff contends that the court erred in finding that the statement, "As a settlement offer, I offer $15,000 cash to settle this matter," was only an offer to compromise, not an acknowledgement of debt. Plaintiff relies upon several decisions it argues stand for the blanket proposition that a letter proposing a settlement, or initiating settlement discussions, constitutes an acknowledgement of debt that restarts the limitations period pursuant to section 2415(a). (See *Midstates Resources*, *supra*, 914 F.Supp. 1424; *U. S. v. J.R. LaPointe* (D. Me. 1996) 950 F.Supp. 21 (*LaPointe*); *U. S. v. Culver* (4th Cir. 1991) 958 F.2d 39 (*Culver*).) These cases recognize that the fact that a statement was made in the context of settlement negotiations does not categorically preclude a finding that it was an acknowledgment of a debt. The determination instead depends upon the particular language used and the surrounding circumstances. (See, e.g., *LaPointe*, *supra*, at p. 23, *U. S. v. Hughes Ranch, Inc.* (1999) 33 F.Supp.2d 1157, 1168, fn. 11 [court rejected categorical assertion that the listing of a debt on a financial statement, which is part of settlement negotiations, is never an acknowledgement of debt].) Nevertheless, the language and circumstances surrounding Roberts's statement, "As a settlement offer, I offer $15,000 cash to settle the matter," differentiate Roberts's statement from the facts in the aforementioned cases.

In *Midstates Resources*, *supra*, 914 F.Supp. 1424, the case upon which plaintiff primarily relies, the debtor's attorney sent a letter requesting that the Federal Deposit Insurance Corporation (FDIC) begin settlement negotiations, "concerning the debts owed" by his clients. "The letter state[d] that *the debts are outstanding*," which the court held was a sufficient acknowledgment of the debts. (*Id.* at p. 1427.) The court further observed that the letter did "not express an unwillingness to pay the debts, and the absence of such an expression justifies an inference of a promise to pay." (*Ibid.*) Similarly, in *LaPointe*, *supra*, 950 F.Supp. 21, the debtor submitted to the creditor a document entitled, "Application for Settlement of Indebtedness." Without further describing the content of this document, the court simply stated that the document

expressly recognized the debtor owed the amounts sought by the creditor. (*Id.* at p. 22.) In *Culver*, *supra*, 958 F.2d 39, the appellants admitted that they were the guarantors of the loan, and "*acknowledged the debt in letters to the [Small Business Administration (SBA)] several times* . . . disputing not the fact of the debt but the total amount due on the note. Further, the Appellants included the note as a debt in a financial statement prepared some time after September 3, 1985; the financial statement was submitted to the SBA early in 1986. They also listed the note in a 1988 financial statement, which was also given to the SBA." The court held that, in this context, "[t]he listing of the debt in the financial statements given to the SBA served as an acknowledgement of the debt and was sufficient to start anew the running of the limitations period as stated in § 2415(a)." (*Id.* at p. 41.)[5]

In contrast to the facts of the foregoing cases, Roberts's statement, "As a settlement offer, I offer $15,000 cash to settle the matter," does not refer to the note as his debt, state that he owes the amount claimed, or admit that he is indebted to plaintiff. Although it is not necessary that an acknowledgment of debt use any particular words, we find nothing in the language of Roberts's statement that can reasonably be understood as a recognition that the amount sought by plaintiff was due, or that Roberts was obligated to pay it. Although Roberts did submit a financial statement to plaintiff, he did not even list the loan as a liability. Therefore nothing in the content of this statement is, even arguably, a recognition that he owed the money plaintiff claimed was due, and plaintiff cites no authority that would permit implying such a recognition merely from the fact that

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[5] Other courts have also recognized that listing a debt as a liability in financial statements, or in other documents, can constitute an acknowledgement of the debt. (See *Federal Deposit Ins. Corp. v. Cardona* (1st Cir. 1983) 723 F.2d 132, 137; *Buxton v. Diversified Resources Corp.* (10th Cir. 1980) 634 F.2d 1313, cert. denied *Diversified Resources Corp. v. Buxton* (1981) 454 U.S. 821, 102 S.Ct. 105, 70 L.Ed.2d 93; *Whale Harbor Spa, Inc. v. Wood* (5th Cir. 1959) 266 F.2d 953.) At least one court, however, has explained that whether the listing of a debt as a liability constitutes an acknowledgement of debt depends on the context and purpose of the document, and that listing a loan as a liability in a financial statement submitted to the creditor for the purposes of negotiating a settlement does not by itself constitute an acknowledgment of debt. (*Lorince, supra*, 773 F.Supp. at pp. 1096-1101.)

he provided the financial statement and tax returns to plaintiff. "[F]or a new payment obligation to accrue, an acknowledgment must clearly convey the debtor's recognition that it actually owed the creditor the claimed money." (*Blusal, supra*, 817 F.2d at p. 1010.) The provision of financial statements and tax returns is entirely consistent with the intent to compromise a disputed claim, by demonstrating the reasonableness of the offer as consonant with the offeror's ability to pay. That act, by itself, is far too equivocal to construe as conveying a recognition that Roberts owed the money plaintiff claimed.

Nor did the writing reflect an intention or promise to pay. Although such a promise or intention may be implied when the debtor recognizes an amount is due and does not deny willingness to pay, " even this . . . standard requires some affirmative 'acknowledgement that a sum of money is actually due' " in the first instance. (*Lorince, supra*, 773 F.Supp. at p. 1096, quoting 1A Corbin, Contracts (1963) § 216, p. 297.) As we have explained, nothing in the text of Roberts's letter, or the circumstance that he included personal financial information, can be understood to recognize the amount claimed was due, or that he was obligated to pay it. Moreover, no intention or promise to pay can be implied in the face of Roberts's *affirmative* statement that he would only offer $15,000, *not* as partial payment of an amount concededly due, but rather "[a]s a settlement offer" and only "to settle the matter." "A settlement offer by itself is not sufficient to renew the statute of limitations. As Corbin has explained: [¶] 'An offer to pay a statement amount in compromise and settlement of a disputed claim is not an acknowledgment of indebtedness, even as to the amount offered; but it is a promise that is conditional on acceptance as settlement in full. This condition must be performed in order to make the promise itself enforceable. If it is accepted by the creditor, there is a sufficient consideration for the debtor's promise; there is a valid and enforceable accord executory. Payment as offered operates as complete satisfaction. If the offer is not accepted as made, the antecedent claim, barred or not barred, is not affected. 1A *Corbin* § 216 at 300-01

(footnotes omitted).' " (*Lorince*, *supra*, at p. 1096, fn. 21.) Roberts's statement therefore was merely a conditional offer to compromise, as the court found.

In sum, to toll the statute of limitations, a written acknowledgment of debt must be clear and unequivocal. (*Blusal*, *supra*, 817 F.2d at p. 1010.) In this case, the correspondence between plaintiff and Roberts concerned an attempt by the parties to settle the RTC's claim. Roberts's letter simply enclosed requested financial information in aid of an effort to negotiate a compromise and settlement, and made a settlement offer. Roberts's letter undoubtedly expressed an interest in settling the plaintiff's claim and avoiding litigation. Yet, Roberts never expressly recognized his, or any of the other defendants', obligation to pay the plaintiff's claim. Nor did he offer, or promise, to pay it. The statement in his March 13, 1995 letter does not express any intention to do so, and he affirmatively offered nothing more than a nominal sum to end the dispute, on the condition that NEI accept this amount as a full settlement of its claim. Considered as a whole, we conclude the record establishes only that Roberts offered to compromise and settle plaintiff's claim for a nominal amount, without expressly, or even implicitly, recognizing the validity of its claim, or defendants' obligation to pay it. The court therefore correctly concluded that Roberts's letter did not constitute a written acknowledgment of debt that restarted the statute of limitations pursuant to section 2415(a), and that the limitations period set forth in section 1821(d)(14) had expired, and barred the action.

CONCLUSION

The judgment, and the postjudgment order awarding attorney fees to defendants, are affirmed. Defendants are awarded their costs on appeal.

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STEIN, Acting P.J.

We concur:

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SWAGER, J.

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MARGULIES, J.